UNEMPLOYMENT COMPENSATION—DISQUALIFICATION CLAUSE—THE RIGHT TO UNEMPLOYMENT BENEFITS FOR LOSS OF ONE JOB WHILE ON STRIKE FROM ANOTHER JOB

Plaintiff brought an action to review the decision of the State of Utah's Department of Employment Security that he did not qualify to receive unemployment compensation benefits.[1] Plaintiff was employed as a heavy equipment operator with Kennecott Copper (hereafter Kennecott) since 1955, and as a bulldozer operator for Pioneer Sand and Gravel (hereafter Pioneer) since 1966, working both jobs on a full time basis since April 20, 1967. Both jobs paid approximately the same hourly wage, but Pioneer did not provide the fringe benefits incident to plaintiff's employment with Kennecott.

On July 15, 1967, a strike by the United Steel Workers resulted in a work stoppage at Kennecott and plaintiff refused to cross the picket lines. During the eight months he was absent from Kennecott due to the labor dispute, he neither resigned nor lost seniority benefits. During the existence of the strike at Kennecott plaintiff maintained a full time position with Pioneer until December 20, 1967, when he was laid off due to inclement weather. Plaintiff's application for unemployment compensation for the period he was unemployed between the layoff at Pioneer and the termination of the work stoppage at Kennecott was denied. The Department of Employment Security ruled that his unemployment status was due to a work stoppage by a strike. On appeal to the Supreme Court of Utah, *held*, affirmed. When a strike at one of two employers temporarily stops work, a layoff by the second employer because of inclement weather does not entitle the employee to unemployment compensation for loss of the second job during the strike that he was out of work from the second employment. *Cruz v. Department of Employment Security,* 22 Utah 2d 393, 453 P. 2d 894 (1969).

State unemployment compensation acts were adopted in response to a comprehensive federal-state social insurance program initiated by the Social Security Act of 1935.[2] The federal Act was an attempt, in part, to alleviate

1. The court based it's decision on UTAH CODE ANN. § 35-4-5(c) (1953): "An individual shall be ineligible for benefits . . . (d) For any week in which it is found by the commission that his unemployment is due to a stoppage of work which exists because of a strike involving his grade, class or group of workers at the factory or establishment at which he is or was last employed."

2. *See, e.g.,* Haggart, *Unemployment Compensation During Labor Disputes,* 37 NEB. L. REV. 668, 695 (1958).

the widespread hardships caused by the depression of the 1930's.[3] The draftsmen of the Act recognized the need to stabilize the effects of the business cycle on unemployment.[4] The states responded to the federal government's example by enacting their own unemployment insurance legislation.[5] The state programs varied in degree of similarity with the federal Act,[6] but due to the impetus of Title III and Title IX,[7] every state included a disqualifying provision in regard to labor disputes.[8]

There are two general categories of labor dispute disqualification provisions.[9] The most common type is based upon the Draft Unemployment Insurance bills drawn by the Social Security Board in 1936 and 1937 for the advice and assistance of state legislators.[10] Basically, the provisions lay down a general rule of disqualification from compensation

3. H.R. DOC. NO. 81, 74th Cong., 1st Sess. 7 (1935); *see, e.g.*, T. BRODEN, LAW OF SOCIAL SECURITY AND UNEMPLOYMENT INSURANCE (1962). The experience of a social insurance legislation in other countries also had a marked influence on the development of an American system. H.R. REP. NO. 615, 74th Cong., 1st Sess. 16-17 (1935). For a history of the development of unemployment compensation in the United States, see Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21 (1945).

4. *See, e.g.*, Haggart, *supra* note 2, at 672; Riesenfeld, *The Place of Unemployment Insurance Within The Patterns And Policies of Protection Against Wage-Loss*, 8 VAND. L. REV. 218, 243 (1955): "Unemployment Insurance . . . is . . . mainly thought of as a second line of defense, and its chief permanent function is to bridge the gap caused by frictional and other transitional unemployment." The supporters of unemployment compensation were not in complete agreement as to the ultimate objectives of the program. Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 YALE L.J. 1, 7 (1945):

> [P]roponents of unemployment insurance were sharply divided into two camps: those who held that the major purpose was to encourage employers to stabilize employment . . . and those who held that the primary purpose was the payment of benefits to unemployed workers.

5. Wisconsin was the only state to experiment in unemployment legislation prior to 1935, but within two years of the passage of the federal Act, every state had unemployment insurance laws.

6. *See, e.g.*, Burns, *supra* note 4, at 2: "[F]rom the very first the laws of the individual states have reflected different purposes and have therefore been characterized by different provisions. . . ."

7. 42 U.S.C. §§ 501-03 (1964) was a federal grant of administration funds. 26 *id.* § 3304 (1964) provided a tax advantage to employers. In order to take advantage of these provisions the state acts had to meet certain requirements approved by the Secretary of Labor.

8. For a general breakdown of similarities and differences among state disqualification provisions see Lewis, *The Law of Unemployment Compensation in Labor Disputes*, 13 LAB. L.J. 174 (1962).

9. *See, e.g.*, T. BRODEN, *supra* note 3, at 357.

10. The draft bill, in turn, was modeled after the British Unemployment Insurance Act of 1935. This type has been adopted by 36 states, including Utah. The other type of labor dispute provision is based on the Wisconsin Unemployment Compensation Act and disqualifies employees who are idled by a labor dispute regardless of the degree of involvement or the merit of the dispute. *See* T. BRODEN, *supra* note 3, at 357-59.

followed by certain exceptions or escape clauses. The general exclusion from benefits depends on a "work stoppage"[11] due to a labor dispute.[12] Unemployment caused by such an event at a factory or establishment[13] where the claimant is or was last employed disqualifies him from benefits. If the particular claimant can show he was not participating in,[14] financing,[15] was not of the same grade or class of the striking workers,[16] or was not directly interested in the labor dispute,[17] he can escape disqualification.[18]

There are three basic arguments upon which the disqualification of benefits to unemployed workers during labor disputes is justified. The first is an adoption of the Social Security Board's Draft Bill phrase that benefits were to be provided for persons who become unemployed "through no fault of their own."[19] The argument is that the purpose of granting unemployment compensation is to protect workers against involuntary unemployment. Thus, since striking employees are not out of work against their will they should not be granted benefits.[20] The second argument is that

11. For cases relating to what constitutes a work-stoppage, see Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947); Robert S. Abbott Pub. Co. v. Annunzio, 414 Ill. 559, 112 N.E.2d 101 (1953); Lawrence Baking Co. v. Michigan Unemployment Compensation Comm'n, 308 Mich. 198, 13 N.W.2d 260 (1944).

12. For materials relating to what constitutes a labor dispute, see Buchholz v. Cummins, 6 Ill.2d 382, 128 N.E.2d 900 (1955); Albondi v. Board of Review, 8 N.J. Super. 71, 73 A.2d 262 (App. Div. 1950); 49 COL. L. REV. 550 (1949).

13. For a discussion of the "factory or establishment" clause, see Baker *Unemployment Benefits in Labor Contraversies: The Anachronisms of the Establishment Doctrine,* 16 BUFFALO L. REV. 715 (1967).

14. For materials relating to the treatment of participating in the labor dispute, see Armory Worsted Mills v. Riley, 96 N.H. 162, 71 A.2d 788 (1950); Philadelphia Marine Trade Ass'n v. Unemployment Compensation Bd. of Review, 202 Pa. Super. 149, 195 A.2d 138 (1963); Williams, *The Labor Dispute Disqualification—A Primer and Some Problems,* 8 VAN. L. REV. 338 (1955).

15. *See, e.g.,* Outboard, Marine & Mfg. Co. v. Gordon, 403 Ill. 523, 87 N.E.2d 610 (1949).

16. *See, e.g.,* Westinghouse Elec. Corp. v. Unemployment Compensation Bd. of Review, 165 Pa. Super. 385, 68 A.2d 393 (1949).

17. *See, e.g.,* Badgett v. Department of Indus. Relations, 243 Ala. 538, 10 So. 2d 880 (1942).

18. *See generally* Lewis, *supra* note 8. In 15 states strikers can receive unemployment compensation if state officials deem the employer in breach of a contract provision, or in violation of a federal or state law.

19. U.S. SOCIAL SECURITY BOARD, DRAFT BILLS FOR STATE UNEMPLOYMENT COMPENSATION OF POOLED FUND AND EMPLOYER RESERVE ACCOUNT TYPES § 2 (1936).

20. For materials relating to this argument, see M. HUGHES, PRINCIPLES UNDERLYING LABOR-DISPUTE DISQUALIFICATION (1946); Lesser, *Labor Disputes and Unemployment Compensation,* 55 YALE L.J. 167 (1945); 37 NOTRE DAME LAW. 739 (1962); 56 NW. U.L. REV. 662 (1961).

the government should remain neutral in economic disputes. The third general argument supporting labor dispute disqualification is a corollary of the neutrality policy[21]—the idea that it would be inequitable to finance strikes with funds derived from the employer.[22]

An area in which the policies and provisions of the state labor dispute disqualification clauses have been intensely litigated is where the claimant stipulates that he was disqualified at one time from receiving benefits, but claims that his subsequent actions remove his ineligibility. Representative of this area are the so-called "stop-gap" cases, where an employee, after a strike at his principal place of employment, finds subsequent employment from which he is later laid off under conditions which would normally qualify him for compensation. In such cases, the courts are faced with conflicting equities. On one hand, the intermittent job can be a means to circumvent the statute.[23] Contrariwise, inherent in the concept of unemployment insurance is the theory that an individual should be encouraged to find work.[24]

To resolve these conflicting considerations, the courts have developed criteria to be applied in each case.[25] The principal determinant is the intent of the employee at the time he accepted the subsequent job.[26] Such factors as the type of work involved[27] and the length of time employed[28] are frequently considered to determine whether the claimant accepted employment without any intention to return to the original job after the strike.[29]

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21. *See, e.g.*, HUGHES, *supra* note 20, at 1; Lesser, *supra* note 20, at 175.

22. The court in Huck v. Industrial Comm'n, 361 S.W.2d 332, 336 (Mo. 1962), expressed the argument as follows: "It is only equitable that employers should not be taxed for unemployment benefits that would aid employees in a strike against the employers."

23. *See, e.g.*, Mark Hopkins, Inc. v. California Employment Comm'n., 24 Cal. 2d 744, 151 P.2d 229 (1944); Bergan Point Iron Works v. Board of Review, 137 N.J.L. 685, 61 A.2d 267 (Ct. Err. & App. 1948).

24. *See generally* Harrison, *Forenote: Statutory Purpose and "Involuntary Unemployment,"* 55 YALE L.J. 117, 119 (1945). "The concept of the involuntary character of the unemployment . . . pegged by the condition . . . that the worker . . . must be available for work . . . *means that the worker must want employment, not unemployment* and must signify his desire at the point where its authenticity may be put to a realistic test." (emphasis added).

25. The leading case in this area is Mark Hopkins, Inc. v. California Employment Comm'n, 24 Cal. 2d 744, 151 P.2d 229 (1944). *See also* Ruberiod Co. v. California Unemployment Ins. Appeals Bd., 59 Cal. 2d 73, 378 P.2d 102, 27 Cal. Rptr. 878 (1963); Scott v. Smith, 141 Mont. 230, 376 P.2d 733 (1962).

26. *See, e.g.*, Brechner v. Florida Indus. Comm'n, 148 So. 2d 567 (Fla. 1963); Scott v. Smith, 141 Mont. 230, 376 P.2d 733 (1962); New Jersey Zinc Co. v. Board of Review, 25 N.J. 235, 135 A.2d 496 (1957).

27. The theory is that a worker who is seeking a permanent job will accept employment in a familiar field. *See generally* Huck v. Industrial Comm'n, 361 S.W.2d 332 (Mo. 1962).

28. *See, e.g.*, Brechner v. Florida Indus. Comm'n, 148 So. 2d 567 (Fla. 1963).

29. The test of intent seems to be subjective rather than objective. For example, the court

In applying this criteria, the courts reason in terms of the continuing relation between the first employer and employee.[30] If the intermittent employment is a permanent, bona fide, full time job, the continuity is broken[31] and the unemployment is not due to the labor dispute, but is the result of losing the later job. However, if the criteria does not apply favorably to the applicant, the subsequent job does not sever the relationship with the original employee,[32] and the applicant is within the disqualification provision.

The majority of the instant court visualized the facts as a stop-gap situation in which the employment at Pioneer was a temporary intermittent job.[33] On this basis, it reached the decision that the Utah disqualification provision applied. It then concluded that it is irrelevant that the Pioneer job was acquired prior to the strike.[34] The court's sole justification was that a contrary holding would make it easy for an employee to take a job in anticipation of labor disputes and thereby circumvent the statute.[35]

The court erred in treating the stop-gap criterion as controlling. This criteria presupposes a situation where the issue is whether or not the subsequent employment ends prior disqualification. In deciding if the second job is intended to be bona fide, permanent, and full time, the courts are determining the effect of the new job on the applicant's preexisting ineligibility. Otherwise, the concept of severance of the employer-employee relationship would have no meaning. Inherent in the concept of severance is the idea of an event occurring which breaks a chain of existing links. The reasoning in the stop-gap cases may be viewed as an exclusive "either/or" concept. Either the applicant is still an employee of his principal employer, or, by reason of a subsequent event, the employment is terminated. When

in Bruley v. Florida Indus. Comm'n, 101 So. 2d 22 (Fla. 1958), did not consider it important whether the employee actually returned to his first job after the strike.

30. *See, e.g.*, Ruberoid Co. v. California Unemployment Ins. Appeals Bd., 59 Cal. 2d 73, 378 P.2d 102, 27 Cal. Rptr. 878 (1963); Mark Hopkins Inc. v. California Employment Comm'n, 24 Cal. 2d 744, 151 P.2d 229 (1944); Gentile v. Director of Div. of Employment Security, 329 Mass. 500, 109 N.E.2d 140 (1942); *See generally* Annot., 28 A.L.R.2d 287 (1953).

31. *See, e.g.*, Bergan Point Iron Works v. Board of Review, 137 N.J.L. 685, 61 A.2d 267 (Ct. Err. & App. 1948).

32. *See, e.g.*, McAllister v. Unemployment Compensation Bd. of Review, 197 Pa. Super. 552, 180 A.2d 121 (1962).

33. Cruz v. Department of Employment Security, 22 Utah 2d 393, 453 P.2d 894, 895 (1969): "[W]e can come to no other conclusion except had Cruz gone with the sand company *after* the strike such employment would not have made him eligible . . . ."

34. *Id.* at 393, 453 P.2d at 895: "The circumstance of double employment at the time of the strike under the facts and concessions here, should not serve to transmute disqualification into qualification."

35. The court fails to explain why it would be more difficult to determine the intent of taking a supplemental job before the strike than accepting one after the strike.

the courts speak of intent in the stop-gap cases, the assumption is that if the employee intends to return to his former job, he also intends to leave his second employment. This is implicit in the criterion of permanent full time employment. In the instant case the two jobs do not stand in the same relation. Whether the job at Pioneer removed a preexisting disqualification under the labor dispute provision is not at issue. Cruz was ineligible for benefits at the time Kennecott went on strike because he was gainfully employed.[36] Further, the effect of the Pioneer job on the employer-employee relationship at Kennecott was the same both before and after the strike.[37] Thus, if the Pioneer job did not sever the employer-employee relationship before the strike, a fortiori, it could not have done so after the work stoppage.

The factual distinctions between the typical stop-gap situation and the instant case demonstrate the logical inconsistency in denying Cruz benefits. The court in the principal case views the criterion of severance with the first employer as the determinant factor in receiving benefits from the second job. The problem with this approach is that the court extends its analogy further than necessary, thereby creating results inconsistent with the stop-gap cases. While the courts in the stop-gap cases speak of severance, the underlying determinative is the permanency of the job for which benefits are sought. The result of their reasoning is that if the applicant's unemployment results from the loss of a permanent job, the existence of a strike does not disqualify him from benefits under the labor dispute provisions. The instant court misinterprets the stop-gap rationale. It views these cases as requiring severance as a necessary element of permanency. In other words, to be permanent, one job must have the function of severing the employer-employee relation at a different job. However, this reasoning is limited to the particular situation where the second job is taken after the strike. The courts in the stop-gap cases are not concluding that severance and permanency are necessarily inclusive concepts, but merely that in a limited situation they are codeterminate. In the principal case, the

36. In many juristictions partial unemployment will bring the applicant within the general disqualification provision. *See, e.g.*, Adelsman v. Northwest Airlines, Inc., 267 Minn. 116, 123, 125 N.W.2d 444, 449 (1963), where the court stated: "To bring the employees here within the statutory disqualification . . . [it] must be established . . . that the employee has left or partially or totally lost his employment . . . ." In Utah, since the job at Pioneer was full time, Cruz would not be deemed unemployed at the time of the strike at Kennecott. UTAH CODE ANN. § 35-4-22(m)(1) (1953) states: "An individual shall be deemed 'unemployed' . . . in any week of *less than full time work* if the wages payable to him with respect to such week are less than his weekly benefit amount." (emphasis added).

37. Viewing the situation in terms of time, the Pioneer job is a constant. The only change or occuring event is his discharge from Pioneer, which can hardly be said to sever the employer-employee relationship at Kennecott.

permanency of the Pioneer job is stipulated. It follows that the logical result should be to allow Cruz benefits for loss of a permanent job at a time when he is receiving no income from any other job.

A further problem in the case which the court failed to consider was that of causation. The statute provides, that for a claimant to be ineligible, it must be found, "that his unemployment is due to a stoppage of work which exists because of a strike." The wording of the statute delineates two aspects of causation.[38] First, the stoppage of work must be caused by the strike. Second, the unemployment status must be caused by the stoppage of work.[39] It is generally accepted that a "but-for"[40] relationship satisfies the work stoppage requirement.[41] However, the unemployment status of the applicant must be the direct or proximate result of the work stoppage.[42] In the instant case only the former causation requirement is met, since only a "but-for" relation exists between the applicant's unemployed status and the work stoppage. While it can be said that Cruz would have been employed but for the strike at Kennecott, the strike did not bring about his unemployed status. Theoretcially, the same is true in the stop-gap line of cases relied on by the court. However, in stop-gap cases courts have taken the position that if the subsequent job does not satisfy the severance requirement, the causal connection between unemployment and work stoppage is not broken.[43] In causation terms, the second job is said to be an insufficient intervening cause.[44]

38. *See, e.g.*, Fierst & Spector, *Unemployment Compensation in Labor Disputes*, 49 YALE L.J. 461, 484 (1940); Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294, 315 (1950); Williams, *supra* note 14, at 344.

39. *See, e.g.*, Abramowitz, *"Stoppage of Work due to a Labor Dispute" as Defined by the Unemployment Compensation Laws*, 10 GEO. WASH. L. REV. 604, 619-20 (1942):

> Although it may be found that at a particular establishment there exists a stoppage of work, that a labor dispute exists, and that the stoppage of work is due to the labor dispute, it need not necessarily be concluded that the claimant's unemployment is caused by the stoppage of work. . . . If the claimant's unemployment . . . is due to some intervening event he may not be disqualified.

40. In other words, the work stoppage is due to the labor dispute only if it would not have existed but for that dispute. If a new factor appears later which would alone be sufficient to cause a stoppage of work, the labor dispute is no longer the *sine qua non* of the stoppage.

41. *See, e.g.*, Williams, *supra* note 14, at 344.

42. *See, e.g.*, Bunny's Waffle Shop, Inc. v. California Employment Comm'n, 24 Cal. 2d 735, 151 P.2d 224 (1944); Mark Hopkins, Inc. v. California Employment Comm'n, 24 Cal. 2d 744, 151 P.2d 229 (1944); Lewis, *supra* note 8, at 183.

43. *See, e.g.*, Brechner v. Florida Indus. Comm'n, 148 So. 2d 567 (Fla. 1963); Gentile v. Director of Div. of Employment Security, 329 Mass. 500, 109 N.E.2d 140 (1952); Huck v. Industrial Comm'n, 361 S.W. 2d 332 (Mo. 1962); McAllister v. Unemployment Compensation Bd. of Review, 197 Pa. Super. 552, 180 A.2d 121 (1962).

44. *See generally* Mark Hopkins, Inc. v. California Employment Comm'n, 24 Cal. 2d 744, 151 P.2d 229 (1944); Bergan Point Iron Works v. Board of Review, 137 N.J.L. 685, 62 A.2d 267 (Ct. Err. & App. 1948).

The causation problem of the principal case can be analogized to the line of cases where an employee is laid off due to the lack of work, and subsequently, a labor dispute arises during the period of unemployment.[45] In such a situation, several jurisdictions have held that the labor dispute does not disqualify the applicant from unemployment benefits until work becomes available and the employee refuses the work because of the dispute.[46] In *Jones and Laughlin Steel Co. v. Unemployment Compensation Board of Review*,[47] the court stated that "where unemployment is due to lack of work, the mere occurrence of a labor dispute will not change the legal causation of unemployment. . . ." However, in cases where the worker actively participates in the subsequent labor dispute some courts stretch the concept of proximate cause to disqualify the applicant.[48] Even in the situation of active participation, the courts, realizing the difficulty of establishing a direct causal link, rely in part upon the availability doctrine.[49] As the court in *Tucker v. American Smelting & Refining Company*[50] said: "By . . . doing 'picket duty' we think he thereby made himself unavailable for work . . . and made his own strike and stoppage of work the direct and proximate cause of his own continued unemployment."[51]

While these cases are distinguishable from the principal case in that they only involve one job, the causation problem is similar. Unlike the stop-gap situation where the doctrine of intervening cause was invoked,[52] it cannot be said of the *Tucker* situation that the work stoppage has directly brought about the unemployment. Since there was no period of unemployment between jobs in the instant case, a direct relation between the unemployment and the labor dispute is similarly missing. Because the jobs were coexistent, there is by definition, no causal connection into which

45. For a general treatment of this line of cases, see 52 CORNELL. L.Q. 738 (1967).

46. Under most state statutes an individual is disqualified from benefits if he does not make himself available for suitable employment or refuses to accept such a job. The state provisions vary on the determination of the meaning of suitable work and when the individual must accept a job. However, all the states, since federal standards require, prohibit denying benefits where the offered position is vacant due to a labor dispute. Further, denial of benefits is prohibited if, as a condition of employment, the individual would be forced to resign or refrain from joining any bona fide union, or accept wages substantially lower than the prevailing wage structure in the locality.

47. 202 Pa. Super. 209, 214, 195 A.2d 922, 925 (1963).

48. *See, e.g.*, Tucker v. American Smelting & Refining Co., 189 Md. 250, 55 A.2d 692 (1947); American Dredging Co. v. Unemployment Compensation Bd. of Review, 208 Pa. Super. 451, 222 A.2d 449 (1966).

49. For background material on the availability concept see, Freeman, *Able to Work and Available for Work*, 55 YALE L.J. 123 (1945); Williams, *supra* note 14.

50. 189 Md. 250, 55 A.2d 692 (1947).

51. *Id.* at 259, 55 A.2d at 696.

52. *See* notes 38-45 *supra* and accompanying text.

the Pioneer job could intervene. Under the analogy with the *Tucker* line of cases, Cruz would be eligible for unemployment benefits. This follows since Cruz, at least insofar as his availability to the labor marker is concerned, cannot be considered an active participant in the strike at Kennecott. The non-act of refusal to cross the picket line, while sufficient to bring him within the labor dispute disqualifying provision in respect to the Kennecott job, is not sufficient to transform the labor dispute work-stoppage into the direct cause of his unemployment.

In addition to the court's misapplication of the labor dispute provision, the policy arguments against granting benefits do not apply. Since it is stipulated that the positions held at both Kennecott and Pioneer were good faith jobs, it does not appear that the neutrality notion is relevant.[53] Cruz is applying for benefits as a result of his discharge from Pioneer, not Kennecott. Therefore, unless it is claimed, as in the stop-gap cases, that the second job was taken to circumvent the statute,[54] it cannot be said that the state would be supporting either side in the Kennecott dispute. Likewise, since Cruz would be receiving remuneration based on his employment with Pioneer, it could not be argued that Kennecott would be subsidizing a strike by its own employees.[55] The voluntary-involuntary policy has never been an absolute doctrine.[56] The courts have deviated from the ordinary sense of volition to reach desired results. For example, an employee may be out of work by his own choice and still receive benefits due to the court's definition of lockout.[57] The voluntary doctrine is also disregarded in some jurisdictions where the labor dispute is attributable to an employer's violation of some labor law,[58] or where an employee has just cause for leaving his job.[59]

Whatever the status of the voluntary argument under the labor dispute

53. *See* notes 2-18 *supra* and accompanying text.

54. *See, e.g.*, Huck v. Industrial Comm'n, 361 S.W.2d 332 (Mo. 1962).

55. The amount of benefits would be based on Cruz's wage scale at Pioneer.

56. For example, Congress prohibits disqualification where the individual refuses to return to work if the struck employer demands a "scab" or strike breaker agreement.

57. *See, e.g.*, Lee Nat'l Corp. v. Unemployment Compensation Bd. of Review, 206 Pa. Super. 96, 211 A.2d 124 (1965).

58. UTAH CODE ANN. § 35-4-5(d)(1) (1953) provides: "[I]f the commission, upon investigation, shall find that such strike is caused by the failure or refusal of any employer to conform to the provisions of any law of the state of Utah or of the United States pertaining to hours, wages, work, such strike shall work such strike shall not render the workers ineligible for benefits." Generally, however, the notion of governmental neutrality in labor disputes has caused states not to allow benefits where the employer is at fault. For a discussion of this topic, see Simrell, *Employer Fault vs. General Welfare as the Basis of Unemployment Compensation*, 55 YALE L.J. 181 (1945).

59. *See, e.g.*, Wolfs v. Iowa Employment Security Comm'n, 244 Iowa 999, 59 N.W.2d 216 (1953); Fannon v. Federal Cartridge Corp., 219 Minn. 306, 18 N.W.2d 249 (1945); Kempfer, *Disqualification for Voluntary Leaving and Misconduct*, 55 YALE L.J. 147 (1945).

disqualification provision,[60] its treatment has a twofold significance to the instant case. First, its treatment demonstrates that the argument is malleable in regard to the equities of the particular situation. The equities of the instant case weigh heavily against the majority opinion. As the dissent points out, the effect of denying Cruz benefits would be to penalize a worker for holding two jobs. This is demonstrated by assuming, in lieu of the actual facts, that the layoff at Pioneer occurred before the strike at Kennecott. On the basis of these facts, Cruz would be ineligible at the time of layoff from Pioneer since he would be still unemployed. He would also be disqualified after the strike at Kennecott by reason of his voluntary unemployment. On the other hand, a less industrious employee of Pioneer, who held only that job, would be eligible for benefits. Second, the reliance on the voluntary doctrine demonstrates that the emphasis in state unemployment compensation acts is on the worker's relation to past employers.[61] This would indicate that the purpose of the acts in general is geared more to providing compensation for loss of a job, than providing benefits for failure to have a job.[62] This view is supported by both the background[63] and mechanism of the acts.[64] In the instant case, such a theory would favor the granting of benefits. If the emphasis were on the failure to have a job at the time of application, the continuance of the employer-employee relation at Kennecott would be a persuasive argument for not granting benefits. This follows from the fact that since workers on strike are considered employed,[65] it could be argued that Cruz had a job when he applied for benefits. However, since the emphasis is on losing a job, the discharge from Pioneer should be given greater consideration. The creation of the need for supplemental income arose from the applicant's discharge from his last employer,[66] Pioneer, regardless of his employer-employee relationship with Kennecott.

The proper interpretation of compensation unemployment in situations presented by the principal case should be that if the applicant has

60. The voluntary doctrine has also come under attack by some commentators. *See, e.g.*, Harrison, *supra* note 24. *See generally* Fierst & Spector, *supra* note 38.

61. *See, e.g.*, Harrison, *supra* note 24.

62. *Id.*

63. *See, e.g.*, Reisenfeld, *supra* note 4, at 232: "The system protects only job seekers who are already and genuinely attached to the labor force and belong to covered occupations."

64. All jurisdictions require that an individual must have earned a specific amount of wages or must have worked for a specific critical period preceding his claim. The amount of remuneration is in relation to this base period.

65. *See, e.g.*, Mark Hopkins, Inc. v. California Employment Comm'n, 24 Cal. 2d 744, 151 P.2d 229 (1944).

66. Such a ruling would not be in violation of the wording of the statute. Some juristictions have interpreted "last employed" strictly. *See, e.g.*, Great Lakes Steel Corp. v. Michigan Employment Security Comm'n, 381 Mich. 249, 161 N.W.2d 14 (1968).